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COURT OF CRIMINAL APPEALS
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No. PD-1225-19

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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ORLANDO BELL, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Burleson County

* * * * *

APPELLANT'S BRIEF ON THE MERITS

* * * * *

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Orlando Bell.

*The case was tried before the Honorable J.D. Langley, Presiding Judge, 21st District Court, Burleson County, Texas.

*Counsel for Appellant in the trial court was Elizabeth Zweiner, 218 North Main Street, Bryan, Texas 77803.

*Counsel for Appellant on appeal was Christopher Matthew Dillon, P.O. Box 446, Bastrop, Texas 78602.

*Counsel for the Appellant before this Court is Wesley T. Keng, 657 E. Austin Street, Giddings, Texas 78942.

*Counsel for the State at trial were Erica Morgan, Bell County District Attorney's Office, P.O. Box 540, Belton, Texas 76513, and Joan Scroggins, Burleson County District Attorney's Office, 205 E. Fox Street, Suite 2004, Caldwell, Texas 77836- 1593.

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INDEX OF AUTHORITIES

Cases

Statutes and Rules

No. PD-1225-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ORLANDO BELL, Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * *

APPELLANT'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

A sentence outside the maximum range of punishment is unauthorized by law and is illegal. An illegal sentence is void and must be reversed.

STATEMENT OF THE CASE

After a plea of not guilty to the offense of failure to comply with sex offender registration requirements, Appellant Orlando Bell was found guilty of the offense by the jury. (C.R. at 148). The jury also found two enhancement paragraphs true and assessed his punishment at fifty (50) years confinement in the Texas Department of Criminal Justice - Institutional Division. (C.R. at 148). On

appeal, Appellant presented one issue wherein he challenged the legal sufficiency of the evidence to support his conviction. The court of appeals held that although the evidence was sufficient, the punishment was illegal and the case should be reversed and remanded to the trial court for a new punishment hearing. *Bell v. State*, No. 07-18-00173-CR, 2019 WL 6766462 (Tex. App.—Amarillo July 24, 2019) (not designated for publication). The court of appeals denied the State's motion for rehearing. *Bell v. State*, No. 07-18-00173-CR, 2019 WL 6205460 (Tex. App.—Amarillo November 19, 2019) (op. on reh'g) (not designated for publication).

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested.

ISSUES PRESENTED

1. **Appellant's sentence, which was outside the maximum punishment range allowed by law, is unauthorized by law, is illegal, and void.**

2. **The evidence is legally insufficient to support Appellant's conviction for failing to comply with registration requirements.**

STATEMENT OF FACTS

On September 9, 1994, Appellant Orlando Bell was convicted of two counts of delivery of a controlled substance and sentenced to eight years' confinement. (R.R. Vol. 5, pp. 43, 48). Subsequently, on November 5, 1997, Mr. Bell was

sentenced to ten years' confinement for the offenses of engaging in organized criminal activity and possession of a controlled substance. (R.R. Vol. 5, pp. 61, 65). On November 13, 2006, Mr. Bell was convicted of sexual assault and sentenced to five years' confinement (R.R. Vol. 5, p. 5). As a result of this last conviction, Mr. Bell was required to register annually as a sex offender for the rest of his life.

Appellant was discharged from prison in August of 2011 and submitted his first sex offender registration stating an address in Caldwell, Texas. (R.R. Vol. 5, pp. 13-14). Later in April of 2014, Mr. Bell registered his sex offender registration address as 507 North Porter, Caldwell, Texas. (R.R. Vol. 3, p. 41). In October of 2014, DPS Officer Robert Neuendorff was conducting sex offender compliance checks in Burleson County. (R.R. Vol. 3, pp. 66-69). As part of this effort, Officer Neuendorff attempted to locate Mr. Bell at his registered address on October 29, 2014 and observed that the house on the property had burned down. (R.R. Vol. 3, p. 69). At the time, there were three vehicles on the property. (R.R. Vol. 3, p. 70). The officer also spoke to some neighbors and family members attempting to locate Mr. Bell. (R.R. Vol. 3, pp. 76-77). During his first two limited visits to the address, Officer Neuendorff did not observe Mr. Bell at the address. (R.R. Vol. 3, p. 78).

Lizzie Jackson told the officer that Mr. Bell "would come and go once in a

while" and that she "really didn't pay any attention because he would come in and go." (R.R. Vol. 3, p. 123-25). Ms. Jackson also noted that "I wasn't around there that long during the day. When I get there in the mornings, sometimes he wouldn't be there." (R.R. Vol. 3, p. 127).

During a follow up visit on November 4, 2014, Officer Neuendorff observed Mr. Bell at the address caring for his animals on the property. (R.R. Vol. 3, p. 78). On November 19, 2014, Officer Neuendorff returned to the address, but did not see Mr. Bell. (R.R. Vol. 3, p. 79). At that time, the officer spoke with Roy Hodrick who testified that he lived in the area. (R.R. Vol. 3, p. 136). Mr. Hodrick stated that Mr. Bell was at the property every day and at least sometimes he stayed on the property in one of the vehicles. (R.R. Vol. 3, p. 139).

At the end of November of 2014, Office Neuendorff began investigating an alternate address for Mr. Bell's residence. (R.R. Vol. 3, p. 82). Based on his investigation, Officer Neuendorff filed the underlying criminal against Mr. Bell alleging that he failed to register after a change in residence. (R.R. Vol. 3, p. 82-83). According to Officer Neuendorff, Appellant explained he was going to the second address daily because it was his girlfriend's residence. (R.R. Vol. 3, p. 84-85). Even though the house had burned down, Mr. Bell still used 507 North Porter, Caldwell, Texas as his residence and was living in one of the vehicles. (R.R. Vol. 3, p. 83; R.R. Vol. 5, Exh. 11). Because he was living in a car, Mr. Bell

had to shower at different places and he was not on the property at all dates and times, but that the address was his residence for all intents and purposes. (R.R. Vol. 5, Exh. 11).

On November 24, 2014, Appellant informed his registration officer of his intent to move from the Porter Street address. (R.R. Vol. 3, p. 44-45). And again, while this case was pending, Mr. Bell returned to the Porter street address as his registered address, where he remained until the trial in February of 2018. (R.R. Vol. 3, p. 46).

Based on the investigation by Officer Neuendorff, a Burleson County grand jury returned an indictment against Mr. Bell alleging that he "intentionally and knowingly fail[ed] to report that he intended to change [his] address … and/or new address." (C.R. p. 13). The indictment included language alleging enhancement under Tex.Penal Code § 12.42(d) for two prior offenses. (C.R. p. 13). The enhancement paragraphs in the indictment were faulty as they had the same date of conviction. (C.R. p. 13). At trial, the State attempted to correct this error with a separate notice of enhancement that alleged Cause No. 10,560 as the first final conviction. (C.R. p. 59). The punishment charge presented to the jury at trial did not properly state the law. (C.R. p. 130-135). The charge did not require that the second enhancement allegation be committed after the first became final. Rather, the jury charge only required the jury to find the conviction in the second

enhancement paragraph became final after the first alleged enhancement offense was *committed*. (C.R. p. 130). (emphasis added). The verdict form paralleled this same error. (C.R. p. 138). A Burleson County jury found Mr. Bell guilty of the offense of failure to comply with sex offender registration requirements, and further found that the two enhancement paragraphs alleging the prior offenses were true. (C.R. at 148). Mr. Bell was sentenced to punishment at fifty (50) years confinement in the Texas Department of Criminal Justice - Institutional Division. (C.R. at 148).

SUMMARY OF THE ARGUMENT

A sentence outside the maximum range of punishment is unauthorized by law and is illegal. An illegal sentence is void and must be reversed. Alternatively, even if the state's argument is correct and a harm analysis applies, this kind of error must be harmful and egregious.

Based on the record, no rational trier of fact could have found that the Defendant failed to register as a sex offender beyond a reasonable doubt. Defendant had a substantial history of showing compliance with the registration requirements and his mere absence on a few occasions is not enough to uphold his conviction. Uncontroverted trial testimony showed that he was living at his registered address. As such, the evidence is legally insufficient to support Defendant's conviction for failing to comply with his sex offender registration

requirements.

ARGUMENT

I. A sentence outside of the maximum range of punishment for the offense is void.

At trial, the State attempted to enhance the Defendant's punishment range by alleging two prior felony convictions. The indictment failed to properly allege the double-enhanced felony punishment range because the felony convictions alleged occurred on the same day. *See Myhand v. State*, No. 03-09-00488-CR, 2010 Tex. App. LEXIS 6358, at *4 (Tex. App.—Austin Aug. 4, 2010, pet. ref'd) (mem. op., not designated for publication). The State then attempted to remedy this mistake by subsequently filing State's Notice of Intent to Use Prior Convictions for Enhancement of Punishment alleging the two prior felonies which were offered into evidence during the punishment phase of trial. (C.R. at 59). A double-enhanced felony conviction requires the State to prove that the second prior felony conviction was both final and "for an offense that occurred subsequent to the first previous felony conviction having become final." *See* TEX. PENAL CODE ANN. § 12.42(d) (West 2018). *See also Ex Parte Pue*, 552 S.W.3d 226, 230-31 (Tex. Crim. App. 2018); *Jordan v. State*, 256 S.W.3d 286, 291 (Tex. Crim. App. 2008) (finding that "when the State seeks to enhance a defendant's sentence for the

primary offense by alleging that a defendant has a prior conviction, and the defendant enters a plea of not true, the factfinder must decide whether the State has sustained its burden by entering a finding that the enhancement allegation is true or not true").

The court of appeals reversed the trial court because the punishment charge failed to tell the jury that the second final felony conviction must have been committed after the first felony conviction became final. Orig. slip op. at 3 n.4; Reh'g slip op. at 3 n.3; (C.R. at 130). The court's charge at trial failed to require a jury finding that the second previous felony conviction was both final and for an offense that occurred after the first previous felony conviction became final. At punishment, the State did not obtain a jury finding that the second previously felony offense of engaging in organized criminal activity was for an offense that occurred subsequent to the first previously felony conviction of delivery of a controlled substance having become final. Therefore, the court of appeals found that the State failed to meet its burden of proof concerning whether the offense was properly double-enhanced. Based on the error in the punishment charge, the jury assessed the Appellant's punishment at fifty years confinement in prison. Because the offense was not properly enhanced, the punishment assessed by the jury exceeded the maximum punishment allowed by law. *See* Tex. Penal Code § 12.42(a). "A sentence that is outside the maximum or minimum range of

punishment is unauthorized by law and therefore illegal." *Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003).

Defendant's sentence at trial is illegal. Because a void sentence cannot be waived, the punishment must be reversed, even though it was not raised by the Defendant on his original appeal. *See Scott v. State*, 988 S.W.2d 947, 948 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *See also Barton v. State*, 962 S.W.2d 132, 139 (Tex. App.—Beaumont 1997, pet. ref'd); *Farias v. State*, 426 S.W.3d 198, 200 (Tex. App.— Houston [1st Dist.] 2013, pet. ref'd) (*citing Hern v. State*, 892 S.W.2d 894, 896 (Tex. Crim.App. 1994) (finding that a sentence outside the statutory range of punishment for an offense is void and must be reversed)). An accused has an "absolute and non-waivable" right to be sentenced within the proper range of punishment. *Gutierrez v. State*, 380 S.W.3d 167, 175 (Tex. Crim. App. 2012). If this right to be sentenced properly is assailed, it can be raised at any time. *Id.* Because the sentence in this case exceeds the maximum punishment allowed by law, the sentence is void.

The State argues that the court of appeals erred when it found that the error was both an "illegal" and "void" sentence based on *Niles v. State*. *See Niles v. State*, 555 S.W.3d 562 (Tex Crim. App. 2018), reh'g denied (Sept. 12, 2018). In *Niles*, this Court held that the commission of an element of an offense from a charge is a charge-error case subject to harm analysis, not an illegal-sentence case.

Id. at 572-73. In *Niles*, the omitted jury finding was an element of the offense itself. *Id.* The court of appeals ruled that this case is not simply an omitted element of the offense, but that it involves the omission of a fact finding that is essential to the determination of the applicable punishment range. Reh'g slip op at 4. "Where the State has failed to request a finding essential to its claimed range of punishment, it waives any right to claim that punishment should be assessed within that range." *Id.*

II. If the sentence in this case is not void, sentencing a Defendant to a punishment outside of the punishment range would be egregious harm.

Even if this court does not agree with the court of appeals, and finds that the error was charge-error, the outcome would be the same. In a charge-error case, absent an objection, a reversal is only warranted if the error is so egregious and created such harm that the Defendant did not have a fair and impartial trial. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op on reh'g). A defendant suffers egregious harm when the error affects the very basis of their case, deprives the defendant of a valuable right or vitally affects a defensive theory. *Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006). How could an error in the charge concerning the punishment range not be egregious? When a defendant's punishment range is affected, it has to deprive the defendant of his right to a fair and lawful punishment. The court of appeals agreed and held that

even if the State's argument was correct and a harm analysis is warranted, this kind of error would always be harmful. Reh'g slip op at 4.

A sentence outside the maximum range of punishment is unauthorized by law and is illegal. An illegal sentence is void and must be reversed. Alternatively, even if the state's argument is correct and a harm analysis should occur, this kind of error must be harmful and egregious. The Court of Appeals held so in their opinion and reversed the punishment on appeal. At a minimum, this Court should do the same.

III. The evidence if legally insufficient to support Appellant's conviction for failing to comply with registration requirements.

In addition to the punishment error that the Court of Appeals reversed on, the Defendant argued on appeal that the evidence was legally insufficient to support appellant's conviction for failing to comply with registration requirements. On review, the sufficiency of the evidence to support a conviction is viewed in the light most favorable to the judgment and determines whether, based on the evidence and reasonable inferences drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). This standard gives the trier of fact the responsibility to resolve conflicts in the testimony, to weigh the

evidence, and to draw inferences from the facts. *Jackson*, 443 U.S. at 319; *see Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007).

To evaluate the sufficiency of the evidence, a reviewing court looks at the evidence in a light most favorable to the verdict to determine whether a rational jury could find the defendant guilty beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 899; *Jackson v. Virginia*, 443 U.S. at 319. To reverse a conviction, appellant must show that no rational jury could have found all the elements of the offense beyond a reasonable doubt. *Brooks*, 323 S.W.3d at 902. The key is whether "the evidence presented actually supports a conclusion that the defendant committed the crime that was charged." *Morgan v. State*, 501 S.W.3d 84, 89 (Tex. Crim. App. 2016) (*quoting Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007)).

The fact finder is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and an appellate court is not to substitute its judgment as to facts for that of the jury. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). When there is a record supporting conflicting inferences, the appellate court must presume the jury resolved the conflict in favor of the verdict, even if not explicit in the record. *Id.*

A reviewing court must determine the sufficiency of the evidence based on the elements of the offense as defined by a hypothetically correct jury charge.

Villarreal v. State, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009) (*citing Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997) (en banc)). This hypothetical charge must accurately set out the law, must be authorized by the indictment in the given case, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant is tried. *Id.*

A defendant commits the offense of failure to register as a sex offender if he "is required to register and fails to comply with any requirement of" chapter 62 of the Code of Criminal Procedure, entitled Sex Offender Registration Program. Tex. Code Crim. Proc. art. 62.102(a); *Young v. State*, 341 S.W.3d 417, 425 (Tex. Crim. App. 2011) ("Article 62.102 is a generalized 'umbrella' statute that criminalizes the failure to comply with any of the registration requirements set out in Chapter 62."); *see Varnes v. State*, 63 S.W.3d 824, 829 (Tex. App.—Houston [14th Dist.] 2001, no pet.) ("If a convicted sex offender fails to meet any of his or her requirements under the statute, the statute imposes criminal liability on him or her for that failure."). A person with a "reportable conviction" is required to register with "the local law enforcement authority in any municipality where the person resides or intends to reside for more than seven days." Tex. Code Crim. Proc. art. 62.051(a).

If a person required to register intends to change his residential address, he "shall, not later than the seventh day before the intended change, report in person

to the local law enforcement authority designated as the person's primary registration authority by the department and to the ... officer supervising the person and provide the authority and the officer with the person's anticipated move date and new address." *Green v. State*, 350 S.W.3d 617, 621 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd); *Villanueva v. State*, 257 S.W.3d 527, 529 (Tex. App.—Austin 2008, no pet.). The Code of Criminal Procedure also provides:

> If a person required to register changes address, the person shall, not later than ... the seventh day after changing the address ... report in person to the local law enforcement authority in the municipality or county in which the person's new residence is located and provide the authority with proof of identity and proof of residence.
>
> Tex. Code Crim. Proc. Ann. art. 62.055(a).

Under the law, all registered sex offenders are required to give notice in person to local law enforcement both when they intend to change their address, and again after they have done so. In a failure to register situation, the criminal allegation is "failing to inform law enforcement about an impending or completed change of residence." *Young*, 341 S.W.3d at 426.

In this case, it is undisputed that upon the defendant's release from prison, he registered his home address with the Caldwell Police Department. (R.R. Vol. 3, pp. 13-14, 41) Additionally, the record is clear the defendant continued to meet his registration requirements by completing his registrations through April 7, 2014.

(R.R. Vol. 3, p. 41). Appellant informed the registration officer for the Caldwell Police Department of his intent to move on November 24, 2014. (R.R. Vol. 3, pp. 44-45). And on September 16, 2015, appellant again registered his address as 507 North Porter where he remained through the trial date of this case in February 2018. (R.R. Vol. 3, p. 46).

On October 29, 2014, law enforcement conducted a "compliance check" at defendant's registered address. (R.R. Vol. 3, p. 66-69). Defendant was not at the address when the check was attempted. (R.R. Vol. 3, p. 66-69). The home at the address had burnt down, but there were vehicles on the property and dogs that were cared for regularly. (R.R. Vol. 3, p. 70). During the compliance check, law enforcement made no attempt to look under the tarp covering one of the vehicles on the property or obtain a warrant to search. (R.R. Vol. 3, pp. 70-71).

After his arrest, the Defendant explained that although the house had burned down, the residence address was still where he could be found. (R.R. Vol. 3, p. 83; R.R. Vol. 5, Exh. 11). The Defendant was present at the address during one of the four times law enforcement went to the property over the course of three weeks. (R.R. Vol. 3, pp. 78-79). An eyewitness testified that the Defendant was at the address on a daily basis to care for his animals and perform tasks at the property. (R.R. Vol. 3, p. 139).

"A registered sex offender is not required to spend every spare moment and

every night at their registered address." *Silber v. State*, 371 S.W.3d 605, 613 (Tex. App.—Houston [1st Dist.] 2012), *citing Whitehead v. State*, 556 S.W.2d 802, 805–06 (Tex. Crim. App. 1977) and *Whitney v. State*, 472 S.W.2d 524, 525 (Tex. Crim. App. 1971). In *Silber*, evidence showed that appellant was not present at the registered address during the day, that he was not often seen by his neighbors at the registered address, that he did not have electricity at the registered address, and that he did not spend every night at the registered address. *See Silber*, 371 S.W.3d at 609-610. This evidence did not constitute evidence that appellant was not still living and residing at the registered address. *Id.* at 613.

Similarly in this case, the Defendant was not present at his residence every time law enforcement conducted a limited compliance check. (R.R. Vol. 3, p. 78). Sometime after April 7, 2014 and before October 29, 2014, the house at the address burned down. (R.R. Vol. 3, p. 69). But regardless of the house, and that law enforcement did not observe the Defendant at the address on October 29, 2014, he was still residing there. His dogs and other animals were still on the property. (R.R. Vol. 3, p. 78). The vehicle he slept in was on the property. (R.R. Vol. 3, p. 139). Witnesses testified that they saw him at the address on a daily basis. (R.R. Vol. 3, p. 139). The Defendant admitted that he would shower at other places and that he spent time with his girlfriend and would go to her grandmother's home, but the grandmother would not allow him to stay at that residence. (R.R. Vol. 3, p. 93).

The record clearly shows that the Defendant fulfilled the strict requirements imposed upon him to register as a sex offender. Upon his release from prison in 2011, he immediately registered. (R.R. Vol. 3, pp. 13-14). He continued to register every year including April 7, 2014 and again on November 24, 2014 when he indicated his desire to move. (R.R. Vol. 3, p. 41). From 2011 to February of 2018, he continued to register as required. After the house burned down at the registered address, Defendant continued to reside at the property, as he had no where else to go. (R.R. Vol. 3, p. 83; R.R. Vol. 5, Exh. 11). Even though law enforcement did not observe him at the address the few times they conducted a compliance check of the address, he continued to live at the residence address.

No rational trier of fact could have found that the Defendant failed to register as a sex offender beyond a reasonable doubt based on this record. Defendant had a substantial history of showing compliance with the registration requirements and his mere absence on a few occasions is not enough to uphold his conviction. Uncontroverted trial testimony showed that he was living at his registered address. As such, the evidence is legally insufficient to support Defendant's conviction for failing to comply with his sex offender registration requirements.

PRAYER FOR RELIEF

WHEREFORE, the Appellant prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals regarding the evidence being legal sufficient at trial and affirm the judgment of the Court of Appeals regarding the sentencing of the Appellant.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that relying on the word count feature of Pages this document contains 5,168 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of July, 2020, the Appellant's Brief on the Merits has been eFiled and electronically served on the following:

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